FILED
AUG 31 1994
OFFICE OF THE CLERK

(4)

No. 93-2055

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION OF AMERICA, *et al.*,
Petitioners,

v.

MARYBETH PETERS, in her capacity as Register of Copyrights, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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August 31, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF OF PETITIONERS

In the petition for a writ of certiorari, petitioners demonstrated that the Eleventh Circuit's decision to ignore circuit precedent construing 17 U.S.C. § 111(f) and to defer to the Copyright Office's later interpretation of that statutory language (1) contradicts this Court's decisions in *Chevron* and *Lechmere,* and (2) conflicts with decisions in three other circuits. Respondents' brief in opposition ignores this Court's decision in *Lechmere* and manifestly mischaracterizes both the principle of *stare decisis* and the bases for decision in the court of appeals cases cited by petitioners. Moreover, respondents never dispute the grave consequences to the satellite broadcasting industry if the erroneous decision of the court below is allowed to stand.

1. Respondents, like the court below, seek to ignore this Court's decisions in *Chevron* and *Lechmere* in order

to reach prematurely the issue of agency deference. Respondents claim that because "[t]he [Copyright] Act does not specifically address the question whether a satellite carrier qualifies as a 'cable system' under Section 111," Opp. 2, the provision is somehow automatically ambiguous, and therefore subject to agency interpretation. No such leap is warranted.

Prior to reviewing an agency's regulatory interpretation, a reviewing court must *first* examine the statute to determine if the intent of Congress is clear. *Chevron U.S.A., Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Specifically, this Court stated that "[i]f a court, *employing traditional tools of statutory construction,* ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9 (emphasis added). Once such a determination has been made, "we adhere to that determination under the doctrine of *stare decisis,* and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Lechmere, Inc.* v. *NLRB,* 112 S. Ct. 841, 847-48 (1992) (quoting *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)).

The Eleventh Circuit in *NBC* v. *Satellite Broadcast Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991) (*"SBN"*) (Pet. App. 17a-25a), made just such a determination of the meaning of Section 111(f). After a thorough examination of "the words Congress chose," Pet. App. 21a, and of what "Congress understood" at the time, Pet. App. 23a, the court determined that Congress had intended to include satellite broadcasters, not just traditional wired cable operators, within the scope of Section 111(f).[1] This determination of the meaning of

[1] In its rulemaking proceeding, the Copyright Office, unlike respondents and the court below, readily admitted that the court in *SBN* had concluded "that *Congress intended* satellite carriers to be

Section 111(f), Pet. App. 25a ("SBN is a cable system as defined under § 111"), derived using traditional tools of statutory interpretation, "is the law and must be given effect" under *Chevron*. 467 U.S. at 843 n.9.[2] The court below failed to accept this interpretation, and the decision below conflicts with this Court's decisions in *Chevron* and *Lechmere*.

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covered by the cable compulsory license. Cable Compulsory License; Definition of Cable System, 57 Fed. Reg. 3284, 3291 (1992) (emphasis added). As noted in the petition, the Copyright Office promulgated a contrary rule, not because of policy objectives, but because of a disagreement on how the text of the statute was to be interpreted. *See* Pet. App. 7; 57 Fed. Reg. at 3292.

[2] Respondents (and the court below) argue that *SBN* is analogous to the court of appeals decision reversed by this Court in *Chevron*. *See* Opp. 5, Pet. App. 6a & n.7 (EPA regulation "contradicted prior D.C. Circuit precedent"). This simply is not the case. In *Natural Resources Defense Council, Inc.* v. *Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982), *rev'd sub nom. Chevron U.S.A., Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court of appeals did *not* reach its decision to disallow the EPA's use of the "bubble" concept in "nonattainment" schemes on the basis of circuit precedent that previously had construed the precise statutory provision in question. *National Resources Defense Council* instead attempted to analogize the Clean Air Act scheme at issue in the case with the "NSPS" regulations at issue in *ASARCO Inc.* v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978) (disallowing the use of the "bubble" concept for "NSPS" regulations).

In an opinion conspicuously absent from the Eleventh Circuit's account of the history of *Chevron*, the D.C. Circuit specifically held that the "bubble" concept was to be evaluated separately for each statutory scheme under the Clean Air Act. *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 401-02 (D.C. Cir. 1979) (*upholding* the use of the "bubble" concept for "PSD" regulations). Thus, D.C. Circuit precedent permitted the use of the "bubble" concept in appropriate circumstances. The court in *National Resources Defense Council* extracted general principles from the distinctions it drew between the types of programs at issue in *ASARCO* and *Alabama Power* and then chose to ignore the agency's proffered interpretation. *National Resources Defense Council*, 685 F.2d at 726 & n.38. Thus, the court of appeals decision reversed in *Chevron* was not following binding precedent and the doctrine of *stare decisis*.

This issue of the interplay between *Lechmere* and *Chevron* in courts of appeals is a matter of fundamental importance. Not only has the issue spawned a clear conflict among the circuits, but it also creates tremendous uncertainty for litigants and trial costs concerning what role *stare decisis* plays in administrative litigation. Accordingly, for the same reasons this Court decided *Lechmere,* it should review the decision in this case.

2. Respondents fail to distinguish the decisions from other circuits that conflict with the approach adopted by the court below. As discussed above, it is simply not the case that the court in *SBN* did not consider congressional intent in its interpretation of Section 111(f). Respondent effectively concedes that under the approaches taken by the Second, Fifth, and Eighth Circuits, once a court reaches an interpretation based on congressional intent, *stare decisis* requires subsequent panels to invalidate later agency promulgations that are contrary to circuit precedent. Opp. 9-12. It is irrelevant that "the court's prior construction of the Copyright Act in *SBN* did not purport to review (let alone invalidate) the agency interpretation that was before the court in this case." Opp. 12. The court construed Section 111(f) of the Copyright Act and the agency's subsequent interpretation of that provision expressly contradicts it. See Cable Compulsory License; Definition of Cable System, 57 Fed. Reg. 3284 (1992). Therefore, the Eleventh Circuit's decision to ignore *stare decisis* and instead to defer to the Copyright Office's interpretation squarely conflicts with decisions of the Second, Fifth, and Eighth Circuits.

3. Respondents argue that this petition should not be held pending the decision in *Variable Annuity Life Insurance Co.* v. *Clarke,* 998 F.2d 1295 (5th Cir. 1993), *cert. granted sub nom., NationsBank, N.A.* v. *Variable Annuity Life Insurance Co.,* 114 S. Ct. 2161 (1994). Respondents argue that the petition filed on behalf of the Comptroller of the Currency in that case "raises no question about the stare decisis effect of the [prior panel]

decision." Opp. 10 n.4. Respondents fail to note, however, that the case is a consolidated action and that the private petitioners—as well as the respondent in opposition—presented as their first question whether the Fifth Circuit had failed to apply correctly *Chevron* by refusing to adopt the Comptroller's construction of the statute at issue, an interpretation contrary to circuit precedent. *Variable Annuity*, No. 93-1612, Cert. Pet. at i.; *Variable Annuity*, Nos. 93-1612, 93-1613, Br. Opp. at i.

4. The approach taken by the Eleventh Circuit of summarily dismissing circuit precedent and the rule of law it evinces is unwarranted. Respondents, like the panel below, ignore the existing mechanisms for review of prior panel decisions that petitioners set out at Pet. 15-16. The circuit courts can review prior decisions *en banc* and this Court can resolve conflicts among the circuits by granting certiorari in appropriate cases. Congress is also free to intervene and change the law, giving the application of *stare decisis* "special force in the area of statutory interpretation." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989). Respondents' suggested approach of total deference to agency interpretations, Opp. 9, would effectively preclude judicial review of agency statutory interpretations and is unnecessary.

Furthermore, Congress is *not* currently considering legislation to amend Section 111(f) and it is that statutory provision which the court below and the Copyright Office have interpreted. It begs the question at issue in this case to assume that the current compulsory licensing provision of Section 119 will—or will not—be extended to protect satellite broadcasters. As this Court has noted, "[t]he mere possibility of future legislation in this field does not, of course, affect the legal merits of petitioner's claim." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 405 n.17 (1970).

5. There could be no clearer indication of the importance of the question presented to the satellite broadcasting industry than the filing of an *amicus curiae* brief *in opposition* to certiorari by the Motion Picture Association of America. Unsurprisingly, the MPAA, the largest recipient of copyright royalties, seeks to dissuade this Court from reviewing the decision below so that it can fully "exploit" satellite broadcasters. *Amicus* Br. 4. Although the policy issues addressed in the *amicus* brief are not properly raised in this case, the MPAA *amicus* brief does not accurately portray the problems facing the satellite broadcasting industry if this Court does not review the decision below. While satellite broadcasters may retransmit approximately 20 different broadcast signals to their subscribers, *Amicus* Br. 6, these broadcast signals contain programs whose rights are held by literally hundreds of rightholders. Absent Section 111(f) compulsory licensing, every broadcast *program*, not just every signal, would be the subject of copyright licensing before retransmission would be permitted. Unlike nonbroadcast channels like HBO, local broadcasters do not hold national distribution rights for the programs they broadcast—other than those programs they produce themselves.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending this Court's decision in *Variable Annuity Life Insurance Co.* v. *Clarke*, 998 F.2d 1295 (5th Cir. 1993), *cert. granted sub nom., NationsBank, N.A.* v. *Variable Annuity Life Insurance Co.*, 114 S. Ct. 2161 (1994).

Respectfully submitted,

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August 31, 1994

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